No. 4137

In the United States Circuit Court of Appeals

For the Ninth Circuit

ROKIYI TAMBARA,

Appellant,

—vs.—

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The applicant ROKIYI TAMBARA, an alien and a native of Japan, sought admission to the United States at the port of Seattle on the 17th day of June, 1923. He is thirty-eight years of age and arrived at this port as a passenger on the S. S.

"Iyo Maru." He was given the usual physical examination by a surgeon of the United States Public Health Service, who on the 19th of June, 1923, certified Rokiyi Tambara "to be afflicted with deafness of such a degree as to interfere with his ability to earn a living. It might have been detected by competent medical examination at the port of embarkation." On the same day the alien was given his hearing before the Board of Special Inquiry at Seattle, the only witness examined being the alien. There was before the Board at that time the surgeon's certificate, above referred to, and there appears in the transcript of the testimony before the Board the following note (Record p. 3):

> "This applicant appears to be very deaf. During the hearing it was necessary for the interpreter to speak loudly, directly into applicant's ear, to enable him to understand the questions. He was unable to hear the ticking of a watch held within one inch of either ear."

After examining the applicant the Board voted unanimously to exclude him as a person "not comprehended within any of the foregoing excluded classes who is found to be and is certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature

which may affect the ability of such alien to earn a living" (Sec. 3, Act of February 5, 1917). An appeal was thereupon taken by the applicant to the Secretary of Labor, two affidavits also being forwarded for the Secretary's consideration on appeal which were not introduced in evidence before the Board of Special Inquiry. These affidavits are by one Frank Morita and R. Rittenhouse, and are attached to the alien's first brief on appeal and contained in the record attached to the Return of the United States Commissioner of Immigration, which is part of the record on this appeal. The Secretary of Labor in due course affirmed the excluding decision of the Board, and the applicant was thereafter, on the 21st of July, 1923, given permission to re-open the case before the Board of Special Inquiry. Thereafter, on the 30th of July, 1923, the Board proceeded to give the applicant's case further consideration, and an additional affidavit was introduced in evidence and considered by the Board, in addition to further testimony by the alien. The testimony before the Board on this second hearing appears in the Commissioner's Return, and the following notation is contained therein:

"It is very difficult for the interpreter to

make the applicant understand an oral quesiton and a part of the questions were propounded to him by writing."

The affidavit by Robert Rittenhouse, Superintendent of the Clark & Wilson Lumber Company, operating at Linnton, Oregon, is to the effect that the alien was employed by that company from April 23, 1917, to March 24, 1921, and that while his hearing was impaired at that time, it would not seriously interfere with his work in such employment, and that affiant stands ready and willing to give the alien employment, and that the alien is capable of earning Four Dollars a day. It is significant that the affiant added to the typewritten statement in the affidavit, "that his impairment of hearing will not in any way interfere with him in earning a living", the following qualification in his own handwriting: "*while in our employ.*" The affidavit of Frank Morita is to the effect that he is an acquaintance of the alien, and that he knows from his personal acquaintance with him that he, the alien, is perfectly able to earn and make a living in this country, and would not become an object of charity, and further, that affiant stands ready to give the alien a permanent job. There is an additional affidavit by Robert

Rittenhouse to the effect that the alien's hearing did not interfere with his work while he was employed by the Clark & Wilson Lumber Company in Oregon.

Upon this record the Board of Special Inquiry for the second time rendered an excluding decision, relying on the terms of Section 3 of the Act of February 5, 1917, above quoted, and the applicant again appealed to the Secretary of Labor, who again affirmed the Board's decision.

The alien made application for a writ of habeas corpus, which application was denied. From the order denying the writ this appeal is prosecuted. The opinion of Judge Neterer, denying the application, is reported in 292 Fed. at page 764.

ASSIGNMENTS OF ERROR

I.

The Court erred in holding and deciding that the petitioner, Rokiyi Tambara, had a fair and impartial trial before the Board of Special Inquiry and before the Secretary of Labor.

II.

The Court erred in holding and deciding that a petition for a writ of habeas corpus herein be dis-

missed, and that the writ of habeas corpus be denied and refused.

III.

The Court erred in holding, deciding and adjudging that the petitioner, Rokiyi Tambara, be remanded to the custody of Luther Weedin, as United States Commissioner of Immigration for the Port of Seattle, for execution of the order and sentence of deportation.

IV.

The Court erred in deciding, holding and adjudging that under the evidence the Board of Special Inquiry and the Secretary of Labor were justified in finding and holding that petitioner, Rokiyi Tambara, is afflicted with a physical defect likely to cause him to become a public charge, and in deciding, holding and adjudging that there was evidence in the record justifying such finding and holding by the said Board of Special Inquiry and the Secretary of Labor.

ARGUMENT

Of these, two assignments only, the first and the fourth need be discussed, as, if there is no merit in either of these two assignments of error, it follows that there is no merit in either the second or

third. And in fact, if on a consideration of the first assignment of error, it is found that the appellant had a fair and impartial trial before the Board of Special Inquiry and before the Secretary of Labor, then neither the court below or this court have any jurisdiction in the premises, as it is only the failure to give the appellant a fair and impartial trial which would give the District Court original jurisdiction and this court appellate jurisdiction.

Chin Yow v. United States, 208 U. S. 11.

We find that the appellant's fourth assignment of error is really the reason relied upon to prove the first assignment of error, and appellant's contention reduces itself to this proposition: Rokiyi Tambara did not have a fair and impartial trial before the Board of Special Inquiry because there is no evidence in the record to justify the holding that the petitioner, Rokiyi Tambara, is afflicted with a physical defect which may affect his ability to earn a living.

An examination of the record indicates that there was ample evidence to justify the finding of the Board of Special Inquiry and its excluding decision based thereon.

There is the surgeon's certificate to the effect that Rokiyi Tambara was "afflicted with deafness

of such a degree as to interfere with his ability to earn a living."

The following is also in the record:

> "This applicant appears to be very deaf. During the hearing it was necessary for the interpreter to speak loudly, directly into the applicant's ear, to enable him to understand the questions. He was unable to hear the ticking of a watch held within one inch of either ear."

And further, it appears from the record that,

> "It is very difficult for the interpreter to make the applicant understand an oral question, and part of the questions were propounded to him in writing."

The last two quotations from the record answer appellant's contention that the Board of Special Inquiry based its finding solely upon the certificate of the surgeon, and did not give the appellant the benefit of their independent judgment. So the case of *Re Kornmehl*, 87 Fed. 314, relied upon by the appellant is not in point, and in any event it is not contended by the appellant that the Secretary of Labor, to whom the appellant twice appealed his case, did not reach his decision after a consideration of the entire record. A consideration of the statute involved and of the decisions there-

under make it clear that the District Court could not have done other than it did in denying appellant's application for a writ of habeas corpus.

Section 3 of the Immigration Act begins by excluding certain classes of physically and mentally undesirable persons, such as idiots, imbeciles, feeble minded persons, epileptics, etc., and then provides that persons not comprehended within any of those excluded classes, and who are found to be and are certified by the examining physician as being physically defective, such physical defect being of a nature which *may* affect the ability of the alien to earn a living, shall be excluded. It is apparent from a perusal of the pertinent parts of this section that Congress had in mind the exclusion of any alien who by reason of physical defects might at some future time become an undesirable citizen.

The fact that a former employer stated that the appellant's impairment of hearing would not in any wise interfere with him in earning a living "while in our employ", or that a friend offers to provide him with remunerative employment, is of no importance, as an offer of present employment may be procured for a man who has lost a leg, or both legs, or an arm, or both arms, or who is afflicted with any other physical defect, and yet, we

know of common knowledge that the loss or impairment of sight or hearing, or the loss of a leg or arm may and does affect an individual's ability to earn a living, and juries award damages daily based on that common knowledge.

The following excerpt from the decision in *United States v. Williams*, 190 Fed. 897, is pertinent and enlightening:

> "As to the first of these propositions, the board had before it the certificate of the examining surgeons that Thomas Buccino was undersized and had 'varicose veins of the left leg which affects his ability to earn a living.' Moreover, the alien was present in person and they had opportunity during the examination which they conducted to form an opinion as to his physical and mental qualifications for earning a livelihood. Ever since the decision of the Supreme Court in *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, it has, so far as I know, been held in this circuit that, if the board of inspectors had the alien before them so that they might themselves inspect and examine him, there was sufficient before them to warrant his exclusion on the ground that he was liable to become a public charge if in their discretion they reached such a conclusion. Nothing which has been presented on this argument persuades me to reverse this holding. It seems to me at least to be in strict conformity to

> the rule enunciated in the Ekiu case and to the proposition enunciated in a host of other cases that the decisions of these boards are not to be set aside by the courts, because they think the weight of testimony does not support the board's conclusion. Speaking for myself, I may also say that, if I were a member of one of these boards of inspection, I should find the statements of relatives and friends that they would look after the new-comer far less persuasive than the enlightenment as to his qualifications to support himself which I might obtain from seeing and talking with him."

In *Wallis v. United States*, 273 Fed. 509, the District Court had permitted an alien to enter upon giving a bond for One Thousand Dollars, on condition that he would not become a public charge. On a review of this decision the Circuit Court of Appeals for the Second Circuit said:

> "We know of no provision of law which warrants a release upon bond. If the appellees were entitled to enter the country, and therefore to their discharge, they were entitled to enter free from the condition of a bond. * * * There is a finding by the Board of Special Inquiry, which is approved by the Department of Labor, certifying to a physical condition of both of the relators, which may affect their ability to earn a livelihood. There is evidence to support this finding that the relators were likely to become pub-

lic charges. The court's jurisdiction, when the remedy of a writ of habeas corpus is invoked in immigration cases, is to inquire whether the ground of exclusion given by the administrative authorities is without any evidence to support it. Unless there is no evidence at all proving or tending to prove that an alien is within one of the excluded classes, the decision of the imimgration authorities is conclusive upon the court, even though the evidence to the contrary be very strong. In *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, the court said: 'A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final'."

Along the same line, Mr. Justice Holmes in *Chin Yow v. United States*, 208 U. S. 11, says:

"If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts

> are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. * * * And by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

In the same decision it is further said:

> "But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In *Wallis v. United States, ex rel Mannara*, 273 Fed. 509, the Court of Appeals for the Second Circuit, speaking through Judge Manton, says:

> "Unless there is no evidence at all proving, or tending to prove, that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive upon the court, even though the evidence to the contrary be very strong."

An analysis of the cases relied on by the appellant will show that they, for the most part, sustain the appellee's position. The case principally relied upon is *United States ex rel Engel v. Tod*, 294 Fed.

820. This case is clearly distinguishable from the case under consideration in that the alien was denied admission as "a person likely to become a public charge", a provision of the statute entirely separate and distinct from that under consideration in this case, to-wit:

> "Persons * * * who are found to be, and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living."

The court in the Engel cases stresses the fact that there were relatives who were willing to support the alien, so that regardless of whether or not he was able to earn a living, he was not likely to become a public charge.

> "The alien's brother had been in the United States for 23 years. He was a naturalized citizen of the United States and was a manufacturer of children's dresses. He had $8000 invested in his business and an income of $100 a week. He owned a property worth $60,000 in which his equity amounted to $20,000. This property he described as a '16 family house' and the income from that house brought in $10,000 a year. In addition he had, as administrator of his deceased wife's estate $5665.
>
> The alien also had an uncle, who was a manufacturer of dresses and a citizen of Brook-

lyn, and had been in the United States for 19 years. He testified that he had $9000 invested in his business, and that he also had invited the alien to come to the United States. He was asked, 'What is he (the alien) to do here to maintain himself?' and he replied:

'We are to take care of him * * * We want at least the only part of our family here. That is all we have left of our entire family. We want to put the boy through a commercial course in college.'

The alien had come to the United States upon the invitation of his brother. The brother was asked, 'What can and will you do for them, (the alien and his son, who was 16 years of age) if admitted?' To this he replied, 'The son I will put in school, and my brother I will keep at the house.'

The cases cited on page 8 of appellant's brief, without exception, are cases where the question involved is, whether the alien was not likely to become a public charge, which as has been pointed out is an entirely different proposition from the possession of a physical defect which may affect the alien's ability to earn a living.

Thus in *Gegiow v. Uhl*, 239 U. S. 3, claimed by the appellant to be very much in point, the single question presented was whether an alien could be declared likely to become a public charge on the

ground that the labor market in the city of his destination was over-stocked, which clearly has nothing to do with the question of the existence of physical disability, which might affect the ability of the alien to earn a living.

In *Pazos v. Redfern*, 180 Fed. 500, the Court conceded that it would have had no jurisdiction if the Board of Special Inquiry had been properly constituted, as its decision would have been binding, and on the merits there was no question of any impairment of the alien's ability to earn a living, the court holding that her husband, already in this country, was earning sufficient to prevent the alien from becoming a public charge. The alien was referred to as strong, healthy and intelligent.

In *United States v. Martin*, 193, Fed. 795, the alien was free from mental or physical disability, followed the occupation of nursing, and had recovered a substantial judgment for damages against a party who had induced her to come to this country on a promise of marriage, subsequently broken. She had funds and friends, and the court held that "there was no indication whatever that she is likely to become a public charge." Observe that there was no question of mental or physical disability

which might impair the alien's ability to earn a living involved in this case.

Sprung v. Martin, 182 Fed. 230, involved three separate cases, but in each case the aliens sought to be deported were women and children supported by their respective husbands and fathers, and it was held there was no likelihood of their becoming public charges. No question of mental or physical disability which might impair the alien's ability to earn a living was involved.

In *United States v. Nakashima*, 160 Fed. 842, the only thing decided was that it was an infringement of an alien's right to deny him the right to appeal to the Secretary of Commerce and Labor from the decision of the Board of Special Inquiry excluding him. And in *United States v. Suekichi*, 199 Fed. 751, the court holds that the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, is not retroactive, and does not apply to certain offenses committed before the adoption of the amendment.

Nor does the final case cited by appellant, *Ex Parte Hosaye Sakaguchi*, 277 Fed. 913, give him aid or comfort, for here again, the question was not one of possible impairment of ability to earn a

living, but a question of the likelihood of the alien becoming a public charge; and the court says that if there was any evidence of mental or physical disability * * * he would have no hesitation in saying that the conclusion of the Board of Special Inquiry would be unassailable in any court. Judge Cushman, in his decision, stresses the fact that the alien in question has no mental or physical disability; and the further fact that if she is not able to earn a living, she has a well-to-do sister and brother-in-law domiciled in this country who stand *ready to receive* and assist her.

Summarizing, we find that not a single one of appellant's authorities is in point; that there is evidence in the record to warrant the conclusion of the Board of Special Inquiry that the appellant, Rokiyi Tambara, has a physical defect which may affect his ability to earn a living, and which warrants the excluding decision based upon that finding; that there is evidence in the record which warrants the affirmation of the finding and decision of the Board of Special Inquiry by the Secretary of Labor; that there is nothing in the record to indicate that the appellant was not accorded a fair trial, and having had a fair trial, this court has no further jurisdiction in the matter.

Hence, we respectfully submit that the District Court properly denied the Writ and its decision should be affirmed.

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